

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA SMITH, Individually and as Personal
Representative of the ESTATE OF ROBERT L.
SMITH,

Plaintiff- Appellant,

v

WOLVERINE PIPELINE COMPANY,

Defendant/Third-Party Plaintiff-
Appellee,

v

HARTFORD CASUALTY INSURANCE
COMPANY,

Defendant/Third-Party Defendant-
Appellee.

UNPUBLISHED
November 5, 1999

No. 212051
Washtenaw Circuit Court
LC No. 97-008481 CZ

Before: Whitbeck, P.J., and Gribbs and White, JJ.

PER CURIAM.

Plaintiff Patricia Smith, Individually and as Personal Representative of the Estate of Robert L. Smith, appeals from the trial court's order granting the motion for summary disposition filed by third-party defendant Hartford Casualty Insurance Company. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Robert Smith, an employee of defendant Wolverine Pipeline Company, filed a claim for worker's compensation benefits. The parties reached a voluntary pay agreement. Hartford,

Wolverine's worker's compensation carrier at the time, failed to pay benefits in a timely manner. Smith died shortly after the agreement was reached. The parties reached a second agreement covering Smith's final expenses and weekly death benefits payable to plaintiff. Again, Hartford failed to make payments in a timely manner.

Patricia Smith sued Wolverine in circuit court seeking a judgment on the voluntary pay agreements, and alleging intentional infliction of emotional distress, bad faith termination of benefits, and discrimination, contrary to MCL 418.301(11); MSA 17.237(301)(11). Wolverine filed a third-party complaint against Hartford. The trial court ordered Hartford to pay benefits in accordance with the voluntary pay agreements. Hartford complied with the order and moved for summary disposition of Patricia Smith's remaining claims pursuant to MCR 2.116(C)(8) and (10). The trial court granted the motion without specifying which section of MCR 2.116(C) applied. Given the trial court's analysis and the nature of the sole issue on appeal, we surmise that the court applied MCR 2.116(C)(8) to summarily dispose of the discrimination claim.

II. Summary Disposition

A. Patricia Smith's Argument

Patricia Smith does not challenge the trial court's grant of summary disposition on the intentional infliction of emotional distress or bad faith termination of benefits counts, but contends that the trial court erred by granting summary disposition on her discrimination claim.

B. Standard Of Review

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

C. Tortious Conduct

A motion for summary disposition pursuant to MCR 2.116(C)(8), tests the legal sufficiency of a claim. *Stott v Wayne County*, 224 Mich App 422, 426; 569 NW2d 633 (1997), aff'd on other grounds 459 Mich 992 (1999). In other words, the court deciding the motion "determines whether the plaintiff's pleadings allege a prima facie case." *Garvelink v Detroit News*, 206 Mich App 604, 608; 522 NW2d 883 (1994). Pursuant to MCR 2.116(G)(5), this Court may only consider the pleadings, "accepting all well pleaded facts as true." *New Hampshire Ins Group v Labombard*, 155 Mich App 369, 372; 399 NW2d 527 (1986). The pertinent inquiry is whether "the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Harrison v Dep't of Corrections*, 194 Mich App 446, 450; 487 NW2d 799 (1992). In its analysis the Court may make reasonable inferences from the allegations in the pleadings. *Id.* at 449-450.

MCL 418.301(11); MSA 17.237(301)(11) prohibits an employer from discharging or otherwise discriminating against an employee based on the employee's pursuit of a claim under the Worker's Disability Compensation Act (WDCA), MCL 418.301 *et seq.*; MSA 17.237(301) *et seq.* A cause of action brought pursuant to MCL 418.301(11); MSA 17.237(301)(11) sounds in tort.

Phillips v Butterball Farms Co, Inc (After Second Remand), 448 Mich 239, 248-249; 531 NW2d 144 (1995). To be viable, a tort claim must assert tortious conduct on the part of the defendant. *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980). Discharge in retaliation for seeking relief under the WDCA constitutes such tortious conduct. MCL 418.301(11); MSA 17.237(301)(11); *Phillips, supra*. However, the failure to pay insurance benefits is not a tortious act. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 604; 374 NW2d 905 (1985). Patricia Smith has failed to allege tortious conduct on the part of Hartford independent of the breach of duty to pay benefits in a timely manner. We conclude that the trial court correctly granted summary disposition Patricia Smith's claim of discrimination. *Id.*; MCR 2.116(C)(8).

Affirmed.

/s/ William C. Whitbeck

/s/ Roman S. Gibbs

/s/ Helene N. White